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Technology Center 2100

Paper No. 14

Gary D. Yacura
Harness, Dickey & Pierce, P.L.C.
P.O. Box 8910
Reston, VA 20195

In re Application of Etzel et al. :
Application No. 09/120,763 : DECISION ON PETITION
Filed: July 22, 1998 : TO WITHDRAW NOTICE OF
Attorney Docket No. ETZEL-5-3-11 : ABANDONMENT UNDER
Title: METHOD AND APPARATUS FOR : 37 CFR §1.181 (a)
ENHANCED CMEA INCLUDING A CMEA :
INTERACTION PRECEDED AND FOLLOWED :
BY TRANSFORMATIONS AND EMPLOYING :
AN INVOLUNTARY LOOKUP :
:

This is a decision on the petition filed August 23, 2002 (via facsimile) under 37 CFR § 1.181(a) to withdraw the holding of abandonment of the above-identified application. An Office action was mailed June 28, 2001 and a reply was not filed within six (6) months from mailing of the Office action. No Notice of Abandonment was mailed.

The petition is **DISMISSED**.

Issues

Mr. Gary D. Yacura has submitted a petition along with exhibits to support the statement that the Office action of June 28, 2001 was not received. The practitioner indicates the attorneys of record and the correspondence address for June 2001 were for the law firm of Birch Stewart Kolasch & Birch and that Mr. Yacura was partner at that firm. The petition does not indicate the address for the law firm of Birch Stewart Kolasch & Birch as of that date. The petition also does not indicate when Mr. Yacura was made of record or the date of any change of firm for Mr. Yacura to the firm of Harness Dickey & Pierce (that is currently of record). It appears the practitioner is stating the exhibits submitted are from the law firm of Birch Stewart Kolasch & Birch (address not given) for Attorney Docket No. 29250-262P. It is unclear whether the docket number is for the firm of Birch Stewart Kolasch & Birch or for Harness Dickey & Pierce (or some other firm).

Decision

In the absence of any apparent irregularity associated with the mailing of an Office communication, the Office presumes that the communication was properly mailed to the address

of record. This presumption may be overcome by showing that the Office communication was not received.

Regarding such a showing, the relevant portion of the MPEP at §711.03(c), section II states:

The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three-month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

Petitioners' submission is deficient in the following matters:

(1) Petitioners state that the "Office Action dated June 28, 2001 was not received." However, in accordance with MPEP §711.03(c), the *practitioner* must make the statement that the Office communication was not received *by the practitioner* (emphasis added). It is noted that the Office records indicate the attorney of record was Mr. Peter H. Priest until March 6, 2002 when a combined change of address and power of attorney was filed via customer number for this application. Therefore, Mr. Peter H. Priest should make the necessary statement.

(2) The practitioner's statement is unclear as to which *firm's* file copy and docket records were searched. Were they the records for the official address of record for June 28, 2001? That address was --

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529 Dogwood Drive
Chapel Hill, NC 27516

If the records being submitted are from another address, the practitioner should clearly state from which firm and that firm's address for any documents filed in any resubmission in response to this petition decision.

(3) The exhibits relating to the docket records are identified with a docket number that is not of record in the Office copy. The attorney docket number is noted above in the caption for this decision. A power of attorney was filed along with the change of address on March 6, 2002 that changed the address to Harness, Dickey & Pierce, P.L.C. but without any corresponding statement of change of attorney docket number. There is no record that the law firm of Birch Stewart Kolasch & Birch was ever of record in this application. The practitioner's statements regarding all record keeping relating to Attorney Docket No. 29250-262P are not being considered pending resolution of the matters relating to the official correspondence address, attorney docket numbers, and powers of attorney.

The practitioner, Mr. Gary Yacura and the law firms of Birch, Stewart, Kolasch & Birch, LLP and Harness, Dickey & Pierce, P.L.C. *were not of record in the application* during the time of the mailing of the Office action of June 28, 2001. Based upon the correspondence received by the Office, it appears applicants' representatives have gone through a series of shifts in identity and address over the prosecution history. The evidence provided does not appear to prove any more conclusively that the Office action (June 28, 2001) was lost in the mail than an equally plausible conclusion that the Office action may have been lost *after receipt*. Therefore, the practitioner should provide the following:

- (a) evidence of the dates of any address changes for correspondence filed with the Office;
- (b) evidence that the records provided are for the official correspondence address of the application at the time of nonreceipt; and
- (c) a clear statement of the dates and addresses for mail to applicants' representatives whether they were of record or not.

These items are in addition to the required statements noted above from the practitioner and proof of power of attorney filing.

Other Matters

Finally, a question exists regarding the timeliness of this petition. Under 37 CFR §1.181(f):

Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

Petitioners indicate they became aware of the Office action that had been mailed June 28, 2001 on June 6, 2002. Petitioners filed a petition on August 26, 2002 (over 2 months after petitioners became aware of the mailing of the office action). The Office may treat as untimely a petition to withdraw the holding of abandonment on its merits unless the petition is accompanied by a terminal disclaimer (see MPEP § 711.03(c) Section I). The terminal disclaimer is being held in abeyance pending the resolution of the matters discussed above to determine whether, in fact, the Office action mailed June 28, 2001 was not received.

The petition is **DISMISSED**.

If the petitioners desire further review of this decision, they should consider filing a Request for Reconsideration within two (2) months of the mailing date of this decision. Inquiries should be directed to the undersigned at (703) 308-0269.


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